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DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP

2101 L Street NW • Washington, DC 20037-1526

Tel (202) 785-9700 • Fax (202) 887-0689

Writer's Direct Dial: (202) 828-2226

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JAN 17 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

January 17, 2001

**HAND DELIVERY**

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
The Portals  
445 12th Street, SW  
Washington, DC 20554

NOTICE OF WRITTEN  
EX PARTE

Re: CC Docket No. 96-96; Restriction in Availability of Unbundled Switching

Dear Ms. Salas:

This letter reports a written ex parte contact by the undersigned with Dorothy Attwood clarifying Birch's position in the above-referenced docket. Enclosed are two copies of the letter sent to Dorothy Attwood.

If you have any questions, please do not hesitate to give me a call.

Sincerely,



Albert H. Kramer

AHK/rw  
cc: Ms. Dorothy Attwood

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Tel (202) 785-9700 • Fax (202) 887-0689

Writer's Direct Dial: (202) 828-2290

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**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

January 17, 2001

Ms. Dorothy Attwood  
Chief – Common Carrier Bureau  
Federal Communications Commission  
445 12<sup>th</sup> St., SW  
Room 5-A848  
Washington, DC 20554

**Re: CC Docket 96-98; Restriction in Availability of Unbundled Switching**

Dear Ms. Attwood:

Birch Telecom, Inc.'s ("Birch") purpose in filing this letter is twofold. First, Birch corrects certain misimpressions left by the few competitive local exchange carriers ("CLECs") that have recently lobbied against an expansion of the availability of unbundled switching.<sup>1</sup> Those carriers have mis-cast the debate—and the choice before the Commission—as the development of facilities-based competition versus the continued availability of the unbundled network platform ("UNE-P"). In fact, UNE-P is a key element of the business plans of many facilities-based carriers. The continued and expanded availability of UNE-P is particularly critical to those carriers, like Birch, who are pursuing a facilities-based strategy for serving small business and residential customers.

Second, Birch explains how the record in this proceeding supports, and, in fact, requires an increase in the line cap on the availability of unbundled switching in density zone 1 of the top 50 Metropolitan Statistical Areas ("MSAs"). The record demonstrates that without unbundled switching and with currently available circuit switching technology, carriers are impaired in their ability to serve customers who are not of a sufficient size to support a DS-1 facility. Birch and other carriers have shown that it is not economical to self-provision switching for customers served by individual analog lines, *even where a switch has already been deployed and the cost of that switch is regarded as a sunk cost*. As explained below, this is due to the costs associated with the provisioning of individual voice lines, especially when the provisioning process must be managed for a large number of relatively small individual customers.

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<sup>1</sup> See section II.B. below for Birch's response to the opposing CLECs.

**I. UNE-P Is Critical to Carriers Like Birch Who Are Pursuing a Facilities-Based Strategy**

One of the fallacies in the debate over an increase in the line cap is that it presents the Commission with the choice between UNE-P and facilities-based deployment. The CLECs who oppose an increase in the line cap suggest that expanding the availability of UNE-P will discourage investment in facilities. This is simply not the case. In fact, as the letter recently filed with the Commission by 12 facilities-based CLECs<sup>2</sup> made clear, UNE-P is a critical component of many facilities-based CLECs' business plans.

In this regard, Birch's story is particularly compelling. Since its inception, Birch's business plan has been the deployment of its own facilities to serve small business and residential customers. Birch's experience makes clear that, far from discouraging the deployment of facilities, UNE-P is a necessary precursor to effective facilities-based competition for that market.

Birch began providing service in St. Joseph, Missouri and small communities in Kansas in 1997 by reselling the services of Southwestern Bell ("SWBT"). Birch's target customer was, and is, small businesses that use conventional business line services. Generally these business are in the 1-10 line range, with most Birch customers having five or fewer lines. Birch met with considerable success in entering its chosen markets and building a customer base.

Birch's initial business plan called for using resale to build a customer and revenue base sufficient to support investment in Birch's own switching facilities. After operating for roughly a year, Birch was able to go to the capital markets to raise money to fund the deployment of its own circuit switches. In the first of what was going to be several waves of deployment, Birch purchased and installed Lucent Class 5 switches in three initial markets: Kansas City, St. Louis, and Wichita.

After turning up its Kansas City switch in early 1999, Birch began converting customers to service using self-provisioned switching and SWBT-provided UNE loops. It soon became apparent, however, that the process of converting individual customer loops was unworkable because of the costs and the complexities of provisioning individual analog UNE loops.<sup>3</sup>

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<sup>2</sup> See Letter from Greg Lawhon, SVP & General Counsel, Birch Telecom, Inc. *et al.* to Chairman William E. Kennard, CC Docket 96-98, filed January 4, 2001.

<sup>3</sup> See section II.A. below for a discussion of how the costs associated with provisioning individual analog UNE loops constitute impairment within the meaning of the statutory standard.

Ultimately, Birch was forced to abandon serving customers using self-provisioned switching, unless those customers have sufficient needs to justify a DS-1 facility. While Birch's three switches are all operational, it uses those switches only to provision service to customers who can be served with a DS-1.

At roughly the same time that Birch was discovering that serving individual analog voice line customers from its own switches was not viable, the Texas Public Utility Commission took steps to make UNE-P widely available as a result of SWBT's Section 271 process. Seeing UNE-P as an opportunity to continue to build a customer and revenue base while it explored other technological options for deploying facilities to serve the small business and residential market, Birch moved aggressively to become a leading UNE-P provider in Texas. When Missouri, Kansas, and later Oklahoma followed Texas in mandating the availability of UNE-P, Birch began serving customers in those states through UNE-P as well.

Birch now serves 23 markets throughout the SWBT region and is in the process of launching 14 markets in the BellSouth region. Birch serves both large cities and small—Houston, Dallas, San Antonio and St. Louis, but also Beaumont, Tyler, Longview, Lubbock, Midland, Odessa, and Topeka. Birch serves all of the markets it enters, not just the downtown business districts served by so many other CLECs, and Birch invests in a local sales force in the markets it serves. In Kansas, for example, Birch serves customers in every county in the state. In short, Birch brings the benefits of competitive service to customers and areas largely ignored by other CLECs, and certainly ignored by those CLECs who have opposed the expansion of switching availability.

Largely because of the availability of UNE-P, over the last three years Birch has been able to rapidly build a customer and revenue base. As of the end of September 2000, Birch served 59,899 customers with 214,218 access lines. Birch's revenue for the third quarter of 2000 was \$32,371,000.

Significantly, Birch would not have been able to build its revenue base in the manner that it has but for the fact that the four-line cap on the availability of unbundled switching (and thus of UNE-P) in the top 50 markets does not apply in the SWBT region.<sup>4</sup> This is the case because Birch's relatively larger customers contribute a disproportionate share of revenue. While Birch's average customer has 3.6 lines, and 70% of its customers have four or fewer lines, over 45% of its revenue comes from customers with seven or more lines. This handful of relatively larger customers have been a cornerstone in building Birch's revenue base. Moreover, if Birch had been unable to serve customers over the four-line cap, it would not have entered the top 50 MSA

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<sup>4</sup> As part of its Section 271 application process, SWBT committed to providing unrestricted unbundled switching, even where it was not required to do so under the FCC's rules.

markets in the SWBT states because of the impairment it would face in those markets. Because of the unrestricted availability of UNE-P—including its availability to serve the higher revenue customers at the top end of the mass market—Birch has been able to generate the revenue and raise the capital necessary for the initial deployment of facilities for serving small business and residential customers.

This point bears emphasis because it is one of the key reasons the Commission must substantially increase the line cap. While raising the line cap slightly would largely allow Birch to use UNE-P to serve more small business customers, without the ability to also serve customers at the high end of the small business user market, it would be difficult if not impossible to generate the revenue necessary to support a successful transition to full-fledged facilities deployment. In other words, the expanded availability of UNE-P to serve the higher revenue customers within the small business market is the key to ensuring that mass market customers, as well as those higher end customers, receive the benefits of facilities-based competition.

Birch is currently in the process of rolling out its own DSL service, which will serve as a precursor to full VoDSL-type service where Birch will use DSL loops coupled with packet switching to provision integrated voice and broadband services. As of year end 2000, Birch had 158 collocations in place with DSLAMs deployed. In 2000 alone, Birch spent more than \$29 million on collocation. Birch is now serving DSL customers in Texas and is in service trials in Missouri, Kansas, and Oklahoma.<sup>5</sup>

Birch has also deployed an extensive ATM switching network, which is already carrying its own in-region long distance traffic. This network will become the backbone of Birch's integrated voice/data network. Last year Birch spent some \$23 million on ATM switching facilities. Overall, in 2000 Birch spent \$105 million on capital expenditures, nearly all for facilities deployment and the supporting back office systems. Birch's business plan calls for a total of \$1 billion investment on facilities deployment over the next ten years.

Birch is currently in the process of beta testing packet switching. Birch has built a proof of concept lab in Kansas City where it has interconnected several different vendors' packet switches to its network and is actively conducting service trials. Birch anticipates that the technology may be ready for deployment by year end 2001 or early 2002. Once the technology is commercially viable, Birch's business plan calls for the deployment of packet switching throughout its network. Birch's preliminary estimates indicate that packet switching should reduce its switching costs by as much as 75%. Those projected cost savings could allow Birch, for the first time, to economically self-provision switching to serve most of its target small business and residential market.

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<sup>5</sup> It is no coincidence that Birch launched its DSL service in Texas. Because of the early availability of UNE-P, Texas was the first state where Birch was able to reach the necessary customer and revenue critical mass for DSL deployment.

In short, UNE-P is the driving force behind Birch's ability to bring facilities-based competition to the mass market. It has allowed Birch to establish itself in its markets and to create the necessary revenue base. Expanding the availability of UNE-P by increasing the line cap on unbundled switching is the only way Birch can continue the transition to packet switch deployment in the markets it currently serves and employ the same strategy as it enters new markets.

## **II. There is Impairment With Respect to Unbundled Switching Below the DS-1 Level**

### **A. New Record Evidence Demonstrates that Impairment Exists for Customers Served Through Individual Analog Voice Lines**

The record before the Commission in this proceeding concerning whether there is impairment with regard to unbundled switching is very different than the record available to the Commission when it decided the *UNE Remand Order*.<sup>6</sup> The record at that time focused on the ability of CLECs generally to deploy their own switching. The Commission found that, while there had been some switch deployment by CLECs, that deployment had occurred principally in the top 50 MSAs and that "there are relatively few competitive switches outside of the top 50 MSAs." *UNE Remand Order*, ¶ 282. The evidence further showed that within the top 50 MSAs, CLEC switch deployment was generally limited to access density zone 1 of those markets. *Id.*, ¶ 285. Based on that record, the Commission concluded that, while CLECs are generally impaired with respect to self-provisioning switching, that impairment does not exist with respect to certain customers in zone 1 of the top 50 MSAs.

Birch believes that the Commission's finding that CLECs are impaired with respect to unbundled switching outside of access density zone 1 of the top 50 MSAs is and was reasonable. Birch's experience confirms the evidence in the record that there has been very little CLEC deployment of switching facilities outside of major metropolitan markets.<sup>7</sup> The Commission was correct that, given the absence of a significant number of CLEC switches outside density zone 1 of the top 50 MSAs, its decision to draw the impairment line at those areas "represents a reasonable

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<sup>6</sup> *In the Matter of the Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking*

<sup>7</sup> If anything, Birch believes the Commission *overstated* the extent of CLEC switch deployment in the top 50 MSAs. Birch, however, is not advocating a change in the geographic areas subject to the restriction on unbundled switching.

approximation of where requesting carriers are not impaired without access to unbundled local circuit switching.” *Id.*<sup>8</sup>

The Commission, however, had little evidence concerning impairment within zone 1 of the top 50 MSAs with respect to serving specific customers. The Commission relied on statements by various incumbent local exchange carriers (“ILECs”), *see UNE Remand Order*, ¶ 291 n.574, to find that even in the markets where CLECs have deployed switches, competition has developed “primarily for business customers or users with substantial telecommunications needs.” *Id.*, ¶ 291. The Commission then arbitrarily selected the three line customer size as the demarcation point “between the mass market . . . and the medium and large business market.” *Id.*, ¶ 294.

The issue, however, is not how many lines constitute a “mass market” customer, but rather at what line size it becomes possible to serve customers efficiently through self-provisioned switching. For customers that cannot be served through a DS-1 there is impairment because a CLEC cannot use its own facilities to viably provide the service it seeks to offer its customers.

Substantial new record evidence makes clear that the customer line size at which it becomes possible to serve a customer through self-provisioned switching—and thus the point below which there is impairment—is the cross-over point at which it becomes possible to serve a customer through a DS-1 facility. As Birch explained at length in its reply to oppositions to its petition for reconsideration, impairment exists below the DS-1 level because of the costs inherent in provisioning individual analog loops to the customer.<sup>9</sup> *See Reply of Birch Telecom, Inc. to Oppositions to its Petition for*

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<sup>8</sup> This sort of line drawing based on record evidence is well within the Commission’s discretion. *See Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998) (court is unwilling to review lines drawn by the Commission “unless a petitioner can demonstrate that [they] . . . are patently unreasonable, having no relationship to the underlying regulatory problem.”) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 60 (D.C. Cir. 1977)); *Julius Goldman’s Egg City v. United States*, 697 F.2d 1051, 1055 (Fed. Cir. 1983) (line drawing generally “is precisely the task for which administrative agencies, with their special expertise and experience, are peculiarly suited to perform effectively; and it is in deference to that experience and judgement that courts refuse to disturb such determinations except when they are shown to be arbitrary.”).

<sup>9</sup> It has been suggested that one possible way to eliminate the impairment associated with the provisioning of individual UNE loops is for the Commission to impose additional requirements on the ILECs in order to improve the coordinated cut-over process. Improving the cut-over process, however, would do nothing to cure the fundamental impairment. While the additional costs resulting from the ILECs’ inadequate procedures for performing coordinated cut-overs *add* to the impairment associated with unbundled switching, the core impairment is the cost of provisioning the individual loop. The

Reconsideration, CC Docket 96-98, filed April 3, 2000 ("Birch Reply") at 4-7. As the Commission correctly found, the manual work required to cut over lines from the ILEC imposes significant costs. *UNE Remand Order*, ¶ 265. The Commission cited CompTel's estimate of the costs as between \$59.91 and \$218.62 per loop. *Id.*, ¶ 266. Birch estimates the total cost to provision a single analog line (including collocation costs, non-recurring charges for unbundled loops, cross-connects, and Birch's costs to perform the manual work to cut over the loop) as \$144. *See Birch Reply* at 7 n.4.

Birch's own experience confirms that impairment exists for customers who cannot be served through a DS-1 facility. As discussed above, Birch has deployed its own circuit switches in three markets. When it initially deployed those switches, Birch attempted to use the switches to serve customers below the DS-1 level. It quickly became apparent, however, that doing so was not economically viable. While Birch continues to serve customers whose needs justify a DS-1 facility from its switches, it no longer uses the switches to provide service to customers with individual analog voice loops. Even for individual analog line customers located a few blocks from one of its switches, Birch has found that the only economical way of serving those customers is through UNE-P.

Therefore, the relevant question under the impairment analysis is: At what point does it become economically viable to serve a customer through a DS-1 instead of multiple analog loops. The best indicator of when a customer is large enough for a DS-1 facility is when the customer has already migrated to such a facility. Thus, the most appropriate level for the cap on the availability of unbundled switching is the DS-1 level.

If, however, the Commission prefers to set the cap at the cross-over point where it becomes economical to transition a customer from multiple individual analog voice lines to a DS-1 facility, Birch has calculated the economic cross-over point at 16-20 lines. *See Birch Reply* at 8-11.<sup>10</sup> Both Birch's analysis and the PACE Coalition's later refinement were based on the best currently available technology, which is the technology Birch currently uses in its network. Thus, the analysis reflects not only theory but Birch's actual operational experience.

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Commission has recognized that that cost "materially diminishes a competitor's ability to substitute its own switch for unbundled switching." *UNE Remand Order*, ¶ 266. While the Commission went on to find that provisioning delays and coordination failures by the ILECs further impair the ability of CLECs to convert customers through the coordinated cut-over process, *id.*, ¶ 271, the Commission did not suggest that without those additional costs imposed by the ILECs there would be no impairment.

<sup>10</sup> The PACE Coalition subsequently refined Birch's analysis, arriving at a cross-over point of 17-22 lines. *See Letter from Genevieve Morelli to Magalie Roman Salas*, CC Docket 96-98, filed October 13, 2000.



Interestingly, Cbeyond Communications, one of the small handful of CLECs that opposes an increase in the line cap, confirms Birch's cross-over analysis. Cbeyond has stated publicly that, given the limitations of currently available circuit switching technology, it is not possible to economically provide service to customers with less than 15 lines through self-provisioned switching. As explained by Cbeyond:

We recognize that there is little competition, and therefore little choice, in the small business market for bundled telecommunications services. High capital requirements of traditional circuit switch based Competitive Local Exchange Carriers (CLECs) force them to target business customers that have *at least 15 lines of local service* to be able to cost justify their bundled service offering.

See [www.cbeyond.net/ps.html](http://www.cbeyond.net/ps.html) (emphasis supplied). This is remarkably consistent with Birch's own 16 - 20 line estimate of the economic cross-over point.

The only other party to submit an analysis regarding the cross-over point is AT&T. AT&T agrees with Birch's cross-over analysis. See Letter from Robert Quinn to Magalie Roman Salas, CC Docket 96-98, filed October 11, 2000 (providing a revised analysis estimating the cross-over point at 18-20 lines).<sup>11</sup>

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<sup>11</sup> Relying on a VoDSL technology that is not yet commercially viable, and a series of rough estimates, AT&T had earlier speculated that the cross-over point might at some future date be as low as 8 lines. See AT&T Corp.'s Petition for Reconsideration and Clarification of the Third Report and Order, CC Docket 96-98, filed February 17, 2000 ("AT&T Petition") at 15-16. At the same time, AT&T acknowledged in its Petition for Reconsideration that given the limits of currently available circuit switching technology "sixteen or more lines at a location" is the point at which it is currently "generally practical for the customer or carrier to use a DS-1 loop facility." (AT&T Petition at 16). Birch's very preliminary cost estimates from its current beta testing of VoDSL do suggest that the cross-over point could be somewhat lower than 16 lines, and could be as low as 8-10 lines. Until the technology is actually deployed and serving customers, however, any estimate of where the cross-over point will fall is at best a guess. If the Commission does decide to base the cross-over point on next generation technology, Birch believes that a 10-12 line cap would provide flexibility in the event that those projections are overly optimistic. (Of course, such a decision would create a service-gap in which customers between 12 and 16 lines would be denied the benefits of competition until technology changes.) As packet switching technology matures and carriers gain operating experience with the new technology, the Commission may be able to assess whether the cap can be reduced further. The Commission's determination that it will revisit its national list of UNEs every three years, *UNE Remand Order*, ¶ 151, rather than setting sunset dates, was based in part on its recognition that it should not attempt to guess how technological developments will affect the marketplace. *Id.*, ¶¶ 149-50. Ultimately, Birch hopes that, with the increasing efficiencies of packet switching, Birch will be able to serve all mass market customers through facilities deployment.

In addition to the costs associated with provisioning individual analog loops, another impairment exists with respect to Birch's target small business customer. It is far more costly and administratively difficult to manage the conversion of 25 four-line customers than it is to manage the conversion of 10 ten-line customers. This is because, in addition to the per-loop costs discussed above, CLECs incur other customer conversion costs on a customer-by-customer basis. These include, but are not limited to, establishing new customer account information in the CLEC's systems, entering the conversion order into the ILEC's OSS, coordinating the actual physical conversion with the ILEC, and working with the ILEC to resolve any cut-over problems. It thus requires significantly more hours of labor *on a per-line basis* to process the conversion of a four line customer than a ten line customer. Moreover, the level of complexity increases dramatically as the number of customer conversions increase. Time-consuming and costly mistakes are more likely when a hundred customers are being converted instead of ten. As a result, Birch's costs to generate a given level of revenue—for example, the revenue produced by 100 lines—are higher than those of a carrier whose typical customer has ten lines instead of four, and certainly higher than a CLEC who averages close to 50 lines per customer.

This additional level of impairment is important for the Commission to consider. It suggests that, absent UNE-P, building a customer and revenue base to support facilities deployment would be much more difficult for CLECs who serve high volumes of residential and small business customers than for those carriers who serve only larger business customers.

**B. The Claims of the Few CLECs Who Oppose an Increase in the Line Cap Do Not Diminish the Showing of Impairment Made by Birch and the Other Carriers Advocating an Increase in the Line Cap**

A handful of facilities-based CLECs have recently begun lobbying the Commission in opposition to an increase in the line cap. In a letter to the Commission filed October 25, 2000, Allegiance Telecom, Time Warner Telecom, Cbeyond Communications, XO Communications, and Cablevision Lightpath, Inc. (collectively, the "Opposing CLECs") urged the Commission to maintain the status quo. They contend that they are serving the small business market through self-provisioned switching and suggest that, therefore, there can be no impairment with respect to that market.

At the outset, the claims of the Opposing CLECs need to be placed into perspective. They represent only a small fraction of the CLEC industry. The Commission has recently heard from 12 other CLECs (including Birch) pursuing various facilities-based strategies, who not only support an increase in the line cap but believe that that UNE-P is an important component of facilities-based business plans. *See* n.2 above. The Competitive Telecommunications Association ("CompTel"), one of the major CLEC trade associations, has also voiced support for an increase in the line cap.

See Letter from Jonathan Lee, VP Regulatory Affairs, CompTel to Magalie Roman Salas, CC Docket 96-98, filed January 10, 2001.<sup>12</sup>

In any case, the Opposing CLECs' claims are wrong for two reasons, one factual and one legal. As a factual matter, the Opposing CLECs serve vastly different markets than the market Birch serves, and with respect to which Birch has demonstrated that it is impaired. Attached is a chart that compares Birch's own customer base and geographic markets to the customer base and geographic markets served by the Opposing CLECs, along with supporting documentation.<sup>13</sup> As the chart makes clear, Birch serves an entirely different customer segment than the Opposing CLECs. Birch's average customer has 3.6 lines. The Opposing CLECs' average customer size ranges from a low of 10—nearly three times Birch's—to a high of 48—an order of magnitude higher than Birch's. Allegiance, who has the 10-line average customer, states that it targets customers with between 4 and 24 lines—its target customer range is significantly above Birch's target customer line size. It therefore comes as no surprise that, in the markets where both Birch and Allegiance are active, Birch's sales representatives seldom encounter Allegiance in the field. To its knowledge, Birch has never lost a targeted customer to Allegiance.<sup>14</sup> As for Cbeyond, which will supposedly serve the 5 to 25 line customer market, the Commission must keep in mind that Cbeyond is not yet in business and has no operational experience germane to where the Commission should set the cap for unbundled switching.

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<sup>12</sup> The Association for Local Telecommunications Services ("ALTS"), another CLEC trade association, has joined the Opposing CLECs in advocating the status quo. See Letter from John Windhausen, Jr., President, ALTS to Magalie Roman Salas, CC Docket 96-98, filed December 15, 2000. ALTS, however, adds little to the debate. It mostly cites the Opposing CLECs' contention that they serve the small business market with self-provisioned switching, without discussing the experiences of any other ALTS members. See *id.* at 3. The only new information that ALTS adds is that CLECs have continued to deploy switching since the *UNE Remand Order* was decided. That assertion, however, completely misses the mark. The question is not whether CLECs have deployed switches, which they inarguably have, but whether CLECs can use those switches to serve customers below the DS-1 level, which Birch and others have demonstrated they cannot.

<sup>13</sup> The chart does not include Cablevision Lightpath because no information concerning Cablevision Lightpath's customer base and markets was publicly available. The chart also reflects no information for Cbeyond, because Cbeyond is not yet operational.

<sup>14</sup> Relatedly, to the best of Birch's knowledge, of the 246 customers it has gained from other CLECs, all have been converted from UNE-P- or resale-based CLECs. Not a single Birch customer has been converted from a facilities-based CLEC.

Given the differences in customer base, the Opposing CLECs' experiences are not relevant to whether Birch and other carriers are impaired below the DS-1 level. This is the case for at least three reasons. First, given the average line sizes being served by the Opposing CLECs, it is likely that a large portion of their customers are served by DS-1 or other high capacity digital facilities. Birch does not contend that there is any impairment with respect to self-provisioned switching where a customer can be served economically by a DS-1 loop or other digital facility.

Second, even to the extent that the Opposing CLECs may be providing service to certain customers through individual analog voice loops, they enjoy higher revenues per customer and lower costs per line because of their much larger average customer size. See p. 9 above. The Opposing CLECs thus do not face the additional degree of impairment faced by Birch and other CLECs who have focused on mass market customers.

Third, the Opposing CLECs' may be serving customers below the DS-1 level unprofitably as part of a broader marketing strategy and subsidizing them with revenue from larger customers.<sup>15</sup> As the Commission recognized in the *UNE Remand Order*, evidence that CLECs are serving a particular market segment does not necessarily mean that such service is viable in the long run. In concluding that CLECs are generally impaired with respect to self-provisioned switching outside of the top 50 markets, the Commission found that

based on financial analysts' reports of competitive LECs' operations, a significant number of requesting carriers currently self-provisioning switches are not generating net income (i.e. profits). Thus, it is too early to know whether self-provisioning is economically viable in the long run, although capital markets appear to be supplying carriers with access to capital in the absence of demonstrated profitability.

<sup>15</sup> As the following chart makes clear, given the capital that they have raised and their available cash on hand, Allegiance, Time Warner, and XO can all afford to bear the losses from an unprofitable market segment in order to continue to build market share and lock up a revenue stream.

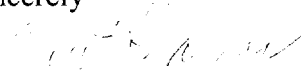
	Allegiance	Time Warner	XO Comm.
Debt and equity raised to date	\$2,926,495,700	\$2,569,800,000	\$8,016,900,000
Cash/cash equivalents Q3 2000	\$764,025,000	\$74,091,000	\$985,527,000

See Allegiance, Time Warner, and XO Communications most recent Securities Exchange Commission 10-Q filings (Time Warner data does not include financing prior to Q4 1997, which was unavailable).

*UNE Remand Order*, 256. The Commission's finding remains equally valid today,<sup>16</sup> with one key exception that further undercuts the Opposing CLECs' claims. Where investors were once willing to bet on the ultimate viability of circuit switching, they no longer are, and capital is no longer available to fund new business plans based on circuit switch deployment.<sup>17</sup>

The Commission should also reject the claims of the Opposing CLECs as a legal matter. The Commission has already held that "the ability of one or more competitors to serve certain customers in a particular market is not dispositive of whether competitive LECs without unbundled access to the incumbent LEC's facilities are able to compete for other customers in the same market or for customers in other markets." *UNE Remand Order*, ¶ 54. The Commission therefore concluded that "we should not adopt rules that would deny access to network elements to all competitors based on the presence of a single competitor that has been able to enter without the use of a particular unbundled network element from the incumbent LEC." *Id.* Thus, even if the Commission were to find that one CLEC was able to viably serve analog voice line customers through self-provisioned switching, that would not preclude a finding that there is no impairment generally with respect to that customer segment.

Sincerely



Albert H. Kramer  
Jacob S. Farber  
*Counsel for Birch Telecom, Inc.*

AHK/rw

cc: Mr. Jonathan Reel  
Ms. Anna Gomez  
Ms. Rebecca Beynon  
Mr. Jordan Goldstein  
Mr. Kyle Dixon  
Ms. Deena Shetler

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<sup>16</sup> Certainly none of the Opposing CLECs can claim profitability.

<sup>17</sup> Not only is the fact that capital has dried up evidence of impairment, it is also in a sense an additional impairment. Even if it were once possible to self-provision unbundled switching to serve the market segment in question, it no longer is, because there are no funds available for circuit switch deployment, and the next generation of packet switches is not yet commercially viable to serve mass market customers.